

Sep 25, 2018

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RICK M.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:17-CV-00283-JTR

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF Nos. 13, 16. Attorney Dana C. Madsen represents Rick M. (Plaintiff); Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 15. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

**JURISDICTION**

Plaintiff filed applications for Supplemental Security Income (SSI) and Disability Insurance Benefits (DIB) on October 16, 2012, Tr. 202-03, 374, alleging disability since April 28, 2004, Tr. 373, due to his neck, shoulder, and lower back, degenerative disk disease, arthritis, high blood pressure, and depression, Tr. 378.<sup>1</sup>

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<sup>1</sup>The Court notes that there are no applications in the record.

1 The applications were denied initially and upon reconsideration. Tr. 258-61, 262-  
2 74. Administrative Law Judge (ALJ) Lori L. Freund held a hearing on February  
3 20, 2015 and heard testimony from Plaintiff. Tr. 107-148. Vocational expert  
4 Jinnie Lawson appeared, but did not testify. *Id.* Plaintiff amended his onset date  
5 to July 21, 2012. Tr. 111-12. The ALJ held a second hearing on February 10,  
6 2016 and heard testimony from Plaintiff and vocational expert Kimberly S.  
7 Mullinax. Tr. 149-83. The ALJ issued an unfavorable decision on April 19, 2016.  
8 Tr. 33-43. The Appeals Council denied review on June 20, 2017. Tr. 1-6. The  
9 ALJ's April 19, 2016 decision became the final decision of the Commissioner,  
10 which is appealable to the district court pursuant to 42 U.S.C. §§ 405(g), 1383(c).  
11 Plaintiff filed this action for judicial review on August 16, 2017. ECF Nos. 1, 4.

## 12 **STATEMENT OF FACTS**

13 The facts of the case are set forth in the administrative hearing transcript, the  
14 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
15 here.

16 Plaintiff was 50 years old at the amended date of onset. Tr. 204. The  
17 highest grade in school he reported completing was the eighth and he did not  
18 receive his GED. Tr. 379. He reported that his past jobs include aircraft detailing,  
19 assembly, auto detailing, customer service, dismantling cars, and stacking  
20 newspapers. Tr. 379, 434-38. Plaintiff reported that he stopped working on  
21 August 20, 2008 due to his conditions. Tr. 378.

## 22 **STANDARD OF REVIEW**

23 The ALJ is responsible for determining credibility, resolving conflicts in  
24 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
25 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
26 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
27 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is  
28 not supported by substantial evidence or if it is based on legal error. *Tackett v.*

1 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
2 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
3 another way, substantial evidence is such relevant evidence as a reasonable mind  
4 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402  
5 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational  
6 interpretation, the court may not substitute its judgment for that of the ALJ.  
7 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative  
8 findings, or if conflicting evidence supports a finding of either disability or non-  
9 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d  
10 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial  
11 evidence will be set aside if the proper legal standards were not applied in  
12 weighing the evidence and making the decision. *Browner v. Secretary of Health*  
13 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

#### 14 **SEQUENTIAL EVALUATION PROCESS**

15 The Commissioner has established a five-step sequential evaluation process  
16 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
17 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one  
18 through four, the burden of proof rests upon the claimant to establish a prima facie  
19 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This  
20 burden is met once the claimant establishes that physical or mental impairments  
21 prevent him from engaging in his previous occupations. 20 C.F.R. §§  
22 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,  
23 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show  
24 that (1) the claimant can make an adjustment to other work, and (2) specific jobs  
25 which the claimant can perform exist in the national economy. *Batson v. Comm'r*  
26 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant  
27 cannot make an adjustment to other work in the national economy, a finding of  
28 "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

1                                   **ADMINISTRATIVE DECISION**

2           On April 19, 2016, the ALJ issued a decision finding Plaintiff was not  
3 disabled as defined in the Social Security Act.

4           At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
5 activity since July 21, 2012, the amended date of onset. Tr. 28.

6           At step two, the ALJ determined Plaintiff had the following severe  
7 impairments: right shoulder impingement syndrome; degenerative disc disease of  
8 the cervical and lumbar spine; alcohol dependence; polysubstance dependence in  
9 various stages of remission; depressive disorder not otherwise specific; and  
10 personality disorder traits. Tr. 28.

11           At step three, the ALJ found Plaintiff did not have an impairment or  
12 combination of impairments that met or medically equaled the severity of one of  
13 the listed impairments. Tr. 30.

14           At step four, the ALJ assessed Plaintiff's residual function capacity and  
15 determined he could perform a range of light work with the following limitations:

16           except he could sit, stand, and/or walk up to six hours in an eight-hour  
17 day with normal breaks; he could push or pull with the right upper  
18 extremity on a frequent, rather than constant, basis; he could  
19 occasionally use foot controls bilaterally; he could frequently balance,  
20 kneel, crouch, and climb ramps or stairs; he could occasionally stoop  
21 and crawl but could never climb ladders, ropes or scaffolds; he could  
22 reach overhead occasionally with both upper extremities; he would  
23 need to avoid concentrated exposure to extreme cold, excessive  
24 vibration, and the operational control of moving machinery; he should  
25 avoid even moderate exposure to unprotected heights; he would be  
26 limited to simple, repetitive tasks of reasoning level 2; he could only  
27 engage in occasional decision-making and tolerate occasional changes  
28 in a work setting; he should avoid production rate or timed, pace work;  
he could have no interaction with the public; and he could tolerate  
superficial contact with co-workers and supervisors but could not  
perform tandem tasks with others.

Tr. 34. The ALJ identified Plaintiff's past relevant work as a painter of transportation equipment, mailer, automobile detailer, cashier, salvage laborer, and automobile body repair helper and concluded that Plaintiff was not able to perform this past relevant work. Tr. 42.

At step five, the ALJ determined that, considering Plaintiff's age, education, work experience and residual functional capacity, and based on the testimony of the vocational expert, there were other jobs that exist in significant numbers in the national economy Plaintiff could perform, including the jobs of cleaner housekeeping and mail clerk. Tr. 43. The ALJ concluded Plaintiff was not under a disability within the meaning of the Social Security Act at any time from July 21, 2012, through the date of the ALJ's decision. *Id.*

## ISSUES

The question presented is whether substantial evidence supports the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards. Plaintiff contends the ALJ harmfully erred by (1) failing to properly weigh the medical source opinions and (2) failing to properly address Plaintiff's symptom statements.

## DISCUSSION<sup>2</sup>

### 1. Opinion Evidence

Plaintiff argues the ALJ failed to properly consider and weigh the opinions

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<sup>2</sup>In *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), the Supreme Court recently held that ALJs of the Securities and Exchange Commission are "Officers of the United States" and thus subject to the Appointments Clause. To the extent *Lucia* applies to Social Security ALJs, the parties have forfeited the issue by failing to raise it in their briefing. See *Carmickle v. Comm'r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (the Court will not consider matters on appeal that were not specifically addressed in an appellant's opening brief).

1 expressed by Dennis R. Pollack, Ph.D., Stacy Jarvis, PA-C, Donna Henry, ARNP,  
2 and nonexamining reviewing physicians. ECF No. 13 at 13-17.

3 In weighing medical source opinions, the ALJ should distinguish between  
4 three different types of physicians: (1) treating physicians, who actually treat the  
5 claimant; (2) examining physicians, who examine but do not treat the claimant;  
6 and, (3) nonexamining physicians who neither treat nor examine the claimant.  
7 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more  
8 weight to the opinion of a treating physician than to the opinion of an examining  
9 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ  
10 should give more weight to the opinion of an examining physician than to the  
11 opinion of a nonexamining physician. *Id.*

12 When an examining physician's opinion is not contradicted by another  
13 physician, the ALJ may reject the opinion only for "clear and convincing" reasons,  
14 and when an examining physician's opinion is contradicted by another physician,  
15 the ALJ is only required to provide "specific and legitimate reasons" to reject the  
16 opinion. *Lester*, 81 F.3d at 830-31. The specific and legitimate standard can be  
17 met by the ALJ setting out a detailed and thorough summary of the facts and  
18 conflicting clinical evidence, stating her interpretation thereof, and making  
19 findings. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). The ALJ is  
20 required to do more than offer her conclusions, she "must set forth [her]  
21 interpretations and explain why they, rather than the doctors', are correct."  
22 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988).

23 **A. Dennis R. Pollack, Ph.D.**

24 Dr. Pollack evaluated Plaintiff on February 14, 2014. Tr. 654-59. He  
25 administered the Clark-Beck Obsessive-Compulsive Inventory, Trail Making Test,  
26 Wechsler Adult Intelligence Scale – IV, and Minnesota Multiphasic Personality  
27 Inventory – 2, and reviewed "[e]xtensive medical reports." Tr. 654, 657-58. He  
28 diagnosed Plaintiff with major depressive disorder, pain disorder associated with

1 both psychological factors and general medical condition, alcohol abuse in  
2 remission, polysubstance abuse in remission, and antisocial personality traits. Tr.  
3 659. He completed a Mental Medical Source Statement finding that Plaintiff had a  
4 marked<sup>3</sup> limitation in the abilities “to perform activities within a schedule,  
5 maintain regular attendance, and be punctual within customary tolerances,” and “to  
6 complete a normal workday and workweek without interruptions from  
7 psychologically based symptoms and to perform at a consistent pace without an  
8 unreasonable number and length of rest periods.” Tr. 661. He also found that  
9 Plaintiff had a moderate limitation in the ability “to accept instructions and respond  
10 appropriately to criticism from supervisors.” *Id.* He found that Plaintiff had no  
11 limitation or a mild limitation in the remaining seventeen functional abilities. Tr.  
12 660-62.

13 The ALJ discussed Dr. Pollack’s opinion throughout her decision. She  
14 found that Dr. Pollack’s diagnosis of pain disorder to be inconsistent with the  
15 objective medical evidence. Tr. 30. As for the Mental Medical Source Statement  
16 form, the ALJ gave Dr. Pollack’s test results and findings of none to moderate  
17 limitations “significant weight,” but rejected the two marked limitations for three  
18 reasons: First, the marked limitations were “wholly inconsistent with Dr. Pollack’s  
19 own objective findings and the other ratings,” and “inconsistent with Dr. Pollack’s  
20 notes of the claimant’s presentation and test results.” Tr. 33, 41. Second, “Dr.  
21 Pollack appeared to base his marked ratings solely on the claimant’s self-reports,  
22 as his objective tests do not support the level of severity. The claimant’s self-  
23 reports are inconsistent with the medical findings, and any ratings based only on  
24 those reports merits little weight.” Tr. 33. Third, Plaintiff provided inconsistent  
25 statements regarding his substance abuse. Tr. 40. The parties agree that the  
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27 <sup>3</sup>A marked limitation is defined as “[s]eriously affects ability to perform  
28 basic work functions on a regular basis.” Tr. 660.

1 specific and legitimate standard is applicable to the ALJ's treatment of Dr.  
2 Pollack's opinion. ECF No. 13 at 15, 16 at 9.

3 The ALJ's first reason for rejecting Dr. Pollack's opined marked limitations,  
4 that they were inconsistent with his own findings and test results expressed in his  
5 report, meets the specific and legitimate standard. The ALJ found that Dr. Pollack  
6 opined that Plaintiff was markedly limited in being punctual yet he appeared on  
7 time at his evaluation. Tr. 33. Likewise, the ALJ found that Dr. Pollack stated that  
8 Plaintiff was only mildly limited in his ability to sustain an ordinary routine, but he  
9 gave him a marked limitation in the ability to complete a normal workday and  
10 workweek or perform at a consistent pace. *Id.* Additionally, the ALJ summarized  
11 Dr. Pollack's rather normal findings and found that they supported his none to mild  
12 limitations opined. Tr. 41. In doing so, she found the marked limitations out of  
13 step with these normal test results and observations made during the evaluation.  
14 Tr. 41. An ALJ may cite internal inconsistencies in evaluating a physician's report  
15 in giving the doctor less weight. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th  
16 Cir. 2005). The specific and legitimate standard can be met by the ALJ setting out  
17 a detailed and thorough summary of the facts and conflicting clinical evidence,  
18 stating her interpretation thereof, and making findings. *Magallanes*, 881 F.2d at  
19 751. Here, the ALJ summarized Dr. Pollack's observations and test results and  
20 gave specific references to how and why they were inconsistent with the marked  
21 limitations opined. As such, the ALJ met the specific and legitimate standard.

22 The ALJ's second reason for rejecting Dr. Pollack's opined marked  
23 limitations, that they were based on Plaintiff's symptom reports instead of  
24 objective evidence, also meets the specific and legitimate standard. A doctor's  
25 opinion may be discounted if it relies on a claimant's unreliable self-report.  
26 *Bayliss*, 427 F.3d at 1217; *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir.  
27 2008). But the ALJ must provide the basis for her conclusion that the opinion was  
28 more heavily based on a claimant's self-reports rather than objective evidence.



1 *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014).

2 Here, the ALJ has provided a reason for her conclusion that Dr. Pollack  
3 relied more heavily on Plaintiff's self-reports than the objective evidence: "Dr.  
4 Pollack appeared to base his marked ratings solely on the claimant's self-reports,  
5 as his objective test results do not support that level of severity." Tr. 33. As  
6 addressed above, the ALJ provided sufficient rationale that the normal test results  
7 supported the none to mild limitations but not the marked limitations. Therefore,  
8 this reason also meets the necessary standard to uphold the ALJ's treatment of Dr.  
9 Pollack's opinion.

10 The ALJ's third reason for rejecting Dr. Pollack's opinion, that Plaintiff  
11 inconsistently reported his substance use "suggest[ing] that Dr. Pollack reached his  
12 conclusions without all relevant information," Tr. 40, meets the specific and  
13 legitimate standard. An ALJ may properly reject a medical opinion that is  
14 rendered without knowledge of a claimant's substance abuse. *See Coffman v.*  
15 *Astrue*, 469 Fed.Appx. 609, 611 (9th Cir. 2012); *Serpa v. Colvin*, No. 11-cv-121-  
16 RHW, 2013 WL 4480016, \*8 (E.D. Wa., Aug. 19, 2013). Plaintiff argues that Dr.  
17 Pollack was aware of Plaintiff's substance use and his opinion took Plaintiff's  
18 discrepancy in reporting his substance use into account. ECF No. 13 at 15.

19 Dr. Pollock summarized the records he reviewed as follows:

20 Medical records indicate that he was continuing to drink as late as 9-  
21 27-12. He was diagnosed on 11-18-2010 with a substance abuse  
22 induced mood disorder by a Montana evaluator. Records from  
23 [K]alispell Regional Medical Center indicate that he has a long history  
24 of alcohol abuse, prescription drug abuse, IV drug abuse as well as  
cocaine and methamphetamine abuse.

25 Tr. 654. Plaintiff reported to Dr. Pollack that he had not drank anything since 2011  
26 and did not report any history of drug abuse. Tr. 656. Dr. Pollock noted these  
27 inconsistencies in his report:  
28

1 He states that he stopped drinking in 2011 which is not consistent with  
2 the medical records. They [*sic*] records indicate that he was still using  
3 alcohol in late 2012. . . Medical records indicate that he was an  
4 intravenous drug user, and abused cocaine and methamphetamine. He  
5 did not report his history of drug abuse.

6 *Id.*

7 On February 17, 2015, Plaintiff's attorney submitted records from CHAS  
8 Clinic which included a July 11, 2013 report from Stacy Jarvis, PAC stating "He  
9 tells me that he has made some really bad decisions and his uncle has helped him  
10 get back into using heroin. He is scared and unsure of how to stop using. He has  
11 tried to purchase suboxone or methadone off the street but it is too expensive for  
12 him." Tr. 683. This reference to heroin use in 2013 is repeated in a July 2014  
13 evaluation. Tr. 668. These records were associated with the administrative record  
14 after Dr. Pollack's February 14, 2014 opinion was rendered and nothing in Dr.  
15 Pollack's report indicates he reviewed these statements. Therefore, Defendant's  
16 argument that Dr. Pollock was aware of the substance use at the time of rendering  
17 his opinion is not accurate. The ALJ's rejection of Dr. Pollock's opinion  
18 references the 2013 heroin usage, Tr. 40, and substantial evidence supports the  
19 notion that Dr. Pollock was likely not aware of the recent heroin use. The Court  
20 will not disturb the weight assigned to Dr. Pollack's opinion.

21 **B. Stacy Jarvis, PA-C**

22 Plaintiff challenges the ALJ's determination discounting Ms. Jarvis' August  
23 21, 2012 opinion.<sup>4</sup> ECF No. 13 at 15-16.

24 As a physician's assistant, Ms. Jarvis does not qualify as an acceptable  
25 medical source. 20 C.F.R. §§ 404.1502(a); 416.902(a). As such, the ALJ is only

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26 <sup>4</sup>The Court notes that Ms. Jarvis provided two opinions. The First on June 5,  
27 2012, Tr. 573-78, and the second on August 21, 2012, Tr. 579-81. Plaintiff only  
28 challenged the second opinion. ECF No. 13 at 15.

1 required to pervade “germane” reasons to reject her opinion. *Molina v. Astrue*, 674  
2 F.3d 1104, 1111 (9th Cir. 2012).

3 On August 21, 2012, Ms. Jarvis evaluated Plaintiff, Tr. 582-86, and opined  
4 that Plaintiff was limited to sedentary work, Tr. 581. At the bottom of the opinion  
5 page, there is a signature from a reviewing and adopting professional which  
6 appears to be an M.D. *Id.* The ALJ found no support for this opinion citing that  
7 just two months earlier Ms. Jarvis found Plaintiff capable of light to medium work  
8 and there was no justification for the reduction in functional capacity. Tr. 37.  
9 Additionally, the ALJ rejected the unknown M.D. signature, stating that “the  
10 undersigned does not consider this an acceptable medical opinion. None of the  
11 claimant’s prior evaluations included a medical doctor’s name or suggested that he  
12 was treated by an acceptable medical source.” *Id.*

13 First, Plaintiff failed to raise any challenges to the ALJ’s reasons for  
14 rejecting the opinion. ECF No. 13 at 15-16. Instead, he asserts that the August 21,  
15 2012 opinion should be given more weight than the June 5, 2012 opinion because  
16 it was endorsed by a physician and that based on the medical evidence “it would be  
17 probable that [Plaintiff] would be limited to sedentary work.” *Id.* Despite  
18 Plaintiff’s assertions, the ALJ’s rationale is sufficient to meet the lessor standard of  
19 germane reasons. The ALJ is accurate that Ms. Jarvis’ June 5, 2012 opinion  
20 stating that Plaintiff was capable of light to medium work is inconsistent with the  
21 August 21, 2012 opinion limiting him to sedentary work. Tr. 573-74. There does  
22 not appear to be any significant change in the two months between the opinions to  
23 justify such a difference. The imaging results Ms. Jarvis discussed in her August  
24 21, 2012 evaluation predate the June 5, 2012 opinion. Tr. 582, 588-93. The  
25 Electrodiagnostic Study submitted with the August 21, 2012 opinion was  
26 completed after the June 5, 2012 opinion, but it showed normal results. Tr. 587.  
27 Therefore, the ALJ’s first reason is supported by substantial evidence and meets  
28 the germane standard.

1 The ALJ's decision to reject the signature of an unknown M.D. is supported  
2 by substantial evidence. A signature appears on the opinion, but it is unclear if it is  
3 a provider who actually examined Plaintiff. Tr. 581. Furthermore, the evaluation  
4 report fails to state whether another provider was present for the exam. Tr. 582-86.

5 Even if the unknown physician had examined Plaintiff, the ALJ's reason for  
6 rejecting the opinion would meet the specific and legitimate standard. *See Bayliss*,  
7 427 F.3d at 1216 (finding that an ALJ may cite internal inconsistencies in  
8 evaluating a physician's report). Therefore, the Court will not disturb the weight  
9 provided to the August 21, 2012 opinion.

10 **C. Donna Henry, ARNP**

11 Plaintiff challenges the ALJ's rejection of Nurse Henry's opinion. ECF No.  
12 13 at 16. Nurse Henry completed a Physical Functional Evaluation form on  
13 August 1, 2014 limiting Plaintiff to sedentary work. Tr. 664-66. The ALJ rejected  
14 the opinion finding that it was inconsistent with the concurrent treatment and  
15 Nurse Henry's own findings. Tr. 38.

16 Plaintiff's challenge consists of a single sentence and fails to address the  
17 reasons the ALJ provided for rejecting Nurse Henry's opinion. *Id.* Instead it  
18 presents an alternative evaluation of the evidence: "CHAS ARNP Henry made the  
19 same limitations opinion in July 2014 as PA-C Jarvis in August 2012. (See TR  
20 579-81, 664-67) ARNP Henry's opinion is supported by the findings of the earlier  
21 opinion that a CHAS physician endorsed, reviewed and adopted the opinion."  
22 ECF No. 13 at 16. It is not this Court's role to reweigh the evidence, but rather to  
23 determine if the ALJ's determination is supported by substantial evidence or based  
24 on legal error. *Sprague*, 812 F.2d at 1229-30; *Tackett*, 180 F.3d at 1097. Since  
25 Plaintiff failed to challenge the reasons the ALJ provided for rejecting Nurse  
26 Henry's opinion, the Court need not address them. *See Carmickle*, 533 F.3d at  
27 1161 n.2 (The Court is not required to consider arguments that are not expressly  
28 raised in Plaintiff's briefing.). This Court will not disturb the weight provided to

1 Nurse Henry's opinion.

#### 2 **D. Nonexamining Reviewing Physicians**

3 Plaintiff argues the ALJ erred by relying on nonexamining physicians to  
4 reject the opinions of examining physicians. ECF No. 13 at 16 (*citing Lester*, 81  
5 F.3d at 830).

6 The Court in *Lester* held that a nonexamining physician's opinion could not,  
7 by itself, constitute substantial evidence that justifies the rejection of the opinion of  
8 an examining or a treating physician. 81 F.3d at 830. However, that is not what  
9 the ALJ has done here. As discussed at length above, the ALJ provided reasons  
10 other than the opinions of nonexamining physicians as support for the weight  
11 provided to the examining providers discussed above. Therefore, Plaintiff's  
12 reliance on *Lester* in this instance is misplaced.

#### 13 **2. Plaintiff's Symptom Statements**

14 Plaintiff argues the ALJ erred by discounting Plaintiff symptoms statements.  
15 ECF No. 13 at 12-13.

16 The ALJ found Plaintiff's "statements concerning the intensity, persistence  
17 and limiting effect of these symptoms are not entirely consistent with the medical  
18 evidence and other evidence in the record." Tr. 35. The ALJ reasoned that  
19 Plaintiff's statements were less than fully credible because the level of limitation  
20 claimed was not supported by objective evidence, Tr. 35, and because Plaintiff  
21 provided misinformation under oath at the hearing, Tr. 29.

22 It is generally the province of the ALJ to make determinations regarding the  
23 credibility of a claimant's symptom statements, *Andrews*, 53 F.3d at 1039, but the  
24 ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*,  
25 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering,  
26 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear  
27 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester*, 81  
28 F.3d at 834. "General findings are insufficient: rather the ALJ must identify what

1 testimony is not credible and what evidence undermines the claimant's  
2 complaints." *Lester*, 81 F.3d at 834.

3 Plaintiff argues that the only reason the ALJ provided for rejecting his  
4 symptom statements were because they were inconsistent with objective medical  
5 evidence. ECF No. 13 at 13-14. He relies upon the Ninth Circuit's holding in  
6 *Robbins v. Soc. Sec., Admin.* that an ALJ cannot make an adverse credibility  
7 determination "solely because" a claimant statements are "not substantiated  
8 affirmative by objective medical evidence." 466 F.3d 880, 883 (9th Cir. 2006).

9 In contrast, Defendant argues that in addition to the inconsistencies with the  
10 medical evidence, the ALJ relied on inconsistent statements by Plaintiff regarding  
11 his ability to walk and on the reported severity of symptoms being inconsistent  
12 with Plaintiff's reported activities. ECF No. 16 at 4-5. Defendant asserts that the  
13 ALJ is not required to use "magic words" to achieve her analysis, as long as the  
14 Court can draw specific and legitimate inferences from her findings. ECF No. 16  
15 at 4 (*citing Magallanes*, 881 F.2d at 755).

16 The Court disagrees with Defendant's reliance on *Magallanes* in this  
17 situation. The Ninth Circuit in *Magallanes* was discussing what was necessary to  
18 meet the specific and legitimate standard in order to reject a provider's opinion.  
19 *Magallanes*, 881 F.2d at 755. When it comes to the crediting or rejecting  
20 Plaintiff's symptom statements, the Circuit Court has held that the standard is  
21 "specific, clear and convincing." *Smolen*, 80 F.3d at 1281. Recent Circuit  
22 decisions have highlighted this standard and identified it as the most demanding  
23 standard to meet. *See Garrison v. Colvin*, 759 F.3d 1014, 1021 (9th Cir. 2014)  
24 (*quoting Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)  
25 ("The clear and convincing standard is the most demanding required in Social  
26 Security cases.")).

27 Therefore, the Court reviews the ALJ's decision carefully and finds that the  
28 ALJ only specifically references the reliability of Plaintiff's statements twice. The

1 most obvious location is in the residual functional capacity determination finding  
2 his statements inconsistent with the objective medical evidence: “In terms of the  
3 claimant’s alleged physical impairments and their corresponding symptoms, the  
4 objective medical evidence does not fully support the level of limitation claimed.”  
5 Tr. 35. The second time is during the step two determination in which the ALJ  
6 specifically found that Plaintiff had likely been untruthful at the hearing:

7       At the second hearing in February 2016, the claimant denied that he  
8       used any street drugs in the previous five years, but he admitted to Stacy  
9       Jarvis, PA-C, in July 2013 that he had started using heroin again and  
10      wanted to stop (Ex. C10F, p5). He reported in July 2014 that he was  
11      “drug-free,” although the reliability of his statement is questionable  
12      given the misinformation he provided under oath at the hearing.

12 Tr. 29.

13       In support of the first reason, that Plaintiff’s symptom statements were not  
14      supported by objective evidence, the ALJ summarized Plaintiff’s allegations and  
15      provided repeated citations to imaging reports and a lack of abnormal examinations  
16      demonstrating a lack of support for the reported severity of symptoms. Tr. 35-36.  
17      Plaintiff’s challenge was simply to provide an alternative interpretation of the  
18      evidence and assert that the medical evidence does support his alleged severity of  
19      statements. ECF No. 13 at 12. As discussed above, this is Court is not a trier of  
20      fact, but reviews whether the ALJ’s determination was supported by substantial  
21      evidence or based on legal error. *See Sprague*, 812 F.2d at 1229-30; *Tackett*, 180  
22      F.3d at 1097. In situations where there is evidence to support both the ALJ’s  
23      determination and Plaintiff’s arguments, the Court gives deference to the ALJ’s  
24      interpretation of the evidence. *Id.* Therefore, the Court will not disturb the ALJ’s  
25      determination that Plaintiff’s allegations were not supported by objective medical  
26      evidence.

27       The ALJ’s second reason, that Plaintiff provided “misinformation” while  
28      under oath at the hearing, went unchallenged by Plaintiff. As such, the Court is not

1 required to address it. *See Carmickle*, 533 F.3d 1155, 1161 n.2. However, both  
2 parties failed to identify this as a reason the ALJ provided for finding Plaintiff's  
3 statements unreliable, so this Court will address it in full.

4 In determining the reliability of Plaintiff's statements, the ALJ may consider  
5 "ordinary techniques of credibility evaluation, such as the claimant's reputation for  
6 lying, prior inconsistent statements . . . and other testimony by the claimant that  
7 appears less than candid." *Smolen*, 80 F.3d at 1284. Here, the ALJ found that  
8 Plaintiff was untruthful during his testimony under oath. Her finding is supported  
9 by substantial evidence. In a July 11, 2013 report Stacy Jarvis, PAC states "He  
10 tells me that he has made some really bad decisions and his uncle has helped him  
11 get back into using heroin. He is scared and unsure of how to stop using. He has  
12 tried to purchase suboxone or methadone off the street but it is too expensive for  
13 him." Tr. 683. This heroin usage in 2013 is referenced again in a July 2014  
14 evaluation. Tr. 668. At the February 2016 hearing, the ALJ questioned Plaintiff  
15 about his use of street drugs in the last five years, and he denied any usage. Tr.  
16 158. In fact, when the ALJ questioned Plaintiff at the February 2015 hearing about  
17 the May and July 2013 references to heroin, Plaintiff denied the use of any street  
18 drugs, asserting that he was only referred to drug treatment for his use of pain pills.  
19 Tr. 143-44. Therefore, the ALJ's determination that Plaintiff provided  
20 "misinformation" while under oath is supported by substantial evidence and is  
21 legally sufficient to support a determination that Plaintiff's symptoms statements  
22 are unreliable.

### 23 CONCLUSION

24 Having reviewed the record and the ALJ's findings, the Court finds the  
25 ALJ's decision is supported by substantial evidence and free of harmful legal error.  
26 Accordingly, **IT IS ORDERED:**

27 1. Defendant's Motion for Summary Judgment, **ECF No. 16**, is  
28 **GRANTED.**



1           2.     Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is **DENIED**.

2           The District Court Executive is directed to file this Order and provide a copy  
3 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**  
4 and the file shall be **CLOSED**.

5           DATED September 25, 2018.

A handwritten signature in black ink, appearing to read "M", is positioned above a horizontal line.

JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE